

1 Marcus James Hooks  
 2 T-89927  
 3 Avenal State Prison  
 4 P.O. Box 9  
 5 Avenal, California 93204  
 6 In Pro Per

FILED

11 FEB 27 PM 1:27

12 CLERK, U.S. DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA

14  
 15 IN THE UNITED STATES DISTRICT COURT  
 16 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 17 SAN FRANCISCO DIVISION

18 MARCUS JAMES HOOKS  
 19 Petitioner  
 20 v.  
 21  
 22 WARDEN OF AVENAL STATE PRISON  
 23 Respondent

24 C 07-3604 JSW (PR)  
 25 DENIAL AND RESPONSE TO THE  
 ANSWER TO THE ORDER TO SHOW  
 CAUSE AND THE MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT THEREOF.

26 Petitioner hereby enters his denial and response to the Answer  
 27 to the Order to Show Cause in the above action, and states:

28 EXCEPTION

29 Respondent has failed to set forth sufficient facts or law to  
 30 show cause why the relief prayed for in the petition should be  
 31 granted.

32 DENIAL  
 33 I.

34 Petitioner denies the Respondent's claim that the state court's  
 35 ruling were not based on an unreasonable determination of the facts  
 36 or were contrary to or involved an unreasonable application of

37 i.

1 clearly established United States Supreme Court Law. Petitioner  
2 specifically denies the Respondents assertion of these claims:

3 II.

4 Petitioner denies the Respondents assertion that the trial court  
5 excluding evidence of insurance industry practices is without merit  
6 also petitioner asserts that the issue before the court is not  
7 whether petitioner knowingly caused a false insurance claim to be  
8 prepared and submitted by purchasing insurance after the accident  
9 that was the subject of his claim, as the Respondent asserts; but  
10 rather the issue is whether petitioner knowingly presented or caused  
11 any false or fraudulent claim for the payment of a loss or injury.

12 III.

13 Concerning claim two, petitioner denies the respondents claim  
14 that the trial court failed in its duty to instruct on mistake  
15 negating the specific intent to commit fraud is without merit; also  
16 petitioner contends that the State Court of Appeals decision is a  
17 unreasonable determination of the facts before the court.

18 IV.

19 Concerning claim three, petitioner denies the Respondent's  
20 claim that petitioner's ineffective assistance of counsel claim is  
21 without merit; also petitioner asserts that the Court of Appeals  
22 decision is an unreasonable application of clearly established  
23 U.S. Supreme Court law in Strickland v. Washington.

24 V.

25 Concerning claim four, petitioner denies the Respondent's claim  
26 assertion that the cumulative error claim is without merit; also  
27 petitioner asserts that the State Court of Appeals decision to this  
28 issue is based upon an unreasonable determination of the facts

1 before it.

2 CONCLUSION

3 Except as expressly admitted above, petitioner denies each and  
4 every allegation of the respondent's return.

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7 **Dated:**

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11 Respectfully submitted,

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13 Marcus James Hooks

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MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF THE RESPONSE TO THE ANSWER TO THE  
ORDER TO SHOW CAUSE

In its return to the order to show cause respondent asserts that claim one is without merit because petitioner has failed to show that the state appellate court made an objectively unreasonable application of clearly established United States Supreme Court precedent or that the state appellate court decision was based upon an unreasonable determination of the facts.

Referencing the State Court of Appeal's decision, the respondent notes the court found that the trial court's exclusion of the proffered expert testimony was not error under state law because the evidence was not relevant to the charges against petitioner and was largely cumulative of other evidence. Respondent contends that expert witness testimony regarding insurance industry practices would not have shown that petitioner did not knowingly cause a false insurance claim to be prepared and submitted by purchasing insurance after the accident that was the subject of his claim.

Petitioner contends that the Court of Appeals decision that the exclusion of the proffered expert testimony was not error because the evidence was not relevant to the charges against petitioner was, "based on an unreasonable determination of the facts in light of evidence presented," in state court 28 U.S.C. sec. 2254(d). Petitioner further contends that the Respondent's claim that the issue is whether petitioner knowingly caused a false insurance claim to be prepared and submitted by purchasing insurance after the accident, was not the ultimate issue at trial. The ultimate issue at trial for count two was whether appellant "knowingly

1 presented or caused any false or fraudulent claim for the payment  
2 of a loss or injury, including...under a contract of insurance,"  
3 either directly or as an aider or abettor. Penal Code sec. 550 subd.  
4 (a)(1). The issue for count three was whether he knowingly prepared  
5 made, or subscribed any writing with the intent to present or use  
6 it, to allow it to be presented, in support of any false or fraud-  
7 ulent claim," Penal Code sec. 550, subd. (a)(5). Here the prosecu-  
8 tion needed to prove appellant failed to present accurate information  
9 knowing it was false, with the specific intent to obtain money  
10 that he was not entitled to receive. Under California law, the  
11 "specific intent to defraud requires both knowledge of the true  
12 facts and an intent to deceive, it is impossible for the defendant  
13 to have intended to defraud the insurance company by presenting  
14 a false claim, and to have done so unknowingly," People v. Booth  
15 (1996) 48 Cal. App. 4th. 1247, 1253.

16 Here, while there is evidence that petitioner bought insurance  
17 after the accident, there was no evidence that he used that insurance  
18 claim to fraudulently obtain a payment claim. In determining  
19 whether appellant acted with the intent to defraud when he apparent-  
20 ly permitted Herns to request compensation for pain and suffering.  
21 The prosecutor argued in closing statement that regardless of  
22 whether Herns testified truthfully (that he was misled by appellant)  
23 or whether Herns lied (and acted in collusion with petitioner to  
24 defraud), appellant was still guilty (3 RT 561-563.) Petitioner's  
25 defense theory was that Herns acted in a legally acceptable  
26 manner by not accurately ascertaining whether appellant was insured  
27 before submitting the request for compensation. The trial court  
28 excluded relevant evidence in the form of James K. Roberts, who was

1 a civil litigation attorney and accepted as an expert witness by  
2 the court. Roberts would have testified that concerning automobile  
3 accidents after the passage of Proposition 213 the burden was placed  
4 on insurance companies to prove that a claimant was not insured  
5 (2 RT 439-440.) Therefore, it was standard practice of personal  
6 injury lawyers in automobile cases to request compensation from  
7 insurance companies for pain and suffering. Roberts testimony was  
8 relevant to forming a conclusion that Herns did not facilitate a  
9 crime by claiming pain and suffering since he did not have the duty  
10 to make this legal conclusion; on the contrary, he had the duty to  
11 claim pain and suffering until Morrison was able to prove appellant  
12 was not insured. Therefore, it was standard practice, if Herns did  
13 not knowingly make an affirmative misrepresentation because he  
14 simply made the claim and left it for Morrison to determine if  
15 petitioner was insured; under this assertion of these facts there  
16 would be no fraud (2 RT 443-445.) The Court of Appeals decision  
17 that the trial court's exclusion of the proffered expert testimony  
18 was not error because the evidence was not relevant to the charges  
19 against him is a decision based on an unreasonable determination of  
20 the facts before the court. Furthermore, not only was the exclusion  
21 of evidence as irrelevant, erroneous. But the consequences of  
22 excluding the evidence was to deprive appellant of due process,  
23 the right to compel witness, and the right to present a defense  
24 under the Fifth, Sixth, and Fourteenth Amendments to the United  
25 States Constitution. A criminal defendant is entitled to call  
26 witnesses and to present a defense to the charges against him, See  
27 Cane v. Kentucky, 476 U.S. 683, 690 (1986) (the state must allow a  
28 defendant the opportunity to present a defense.) Washington v. Tex-

1 as, 388 U.S. 14, 19 (1967) (the state must allow a defendant to  
2 present witnesses to the alleged crime.) Petitioner disagrees with  
3 the respondents assertion that here, petitioner was not denied the  
4 opportunity to present a defense. In fact, petitioner was denied  
5 both. As appellant explained in the offer of proof, Roberts would  
6 have explained that Herns did not have a duty to determine accurately  
7 if appellant were insured at the time of the accident to make a  
8 request for compensation for pain and suffering. Instead it was the  
9 insurance company's duty to prove a claimant was uninsured. There  
10 was a factual basis which made the defense theory relevant.  
11 Morrison said that although it became much less common for attorneys  
12 to represent claimants who were uninsured, the nature of claims  
13 did not change after the passage of Proposition 213 (1 RT 139.)  
14 Herns said he did not know if he had spoken with appellant before  
15 making the demand (2 RT 272, 276-277.) Although appellant apparent-  
16 ly represented to Herns that he was insured the day of the accident,  
17 Herns did not attempt to determine what time the insurance went  
18 into effect (2 RT 304, 306, 328.) Herns correctly assumed that  
19 Morrison allegation in November 2002 that appellant was uninsured  
20 was based on an entry in the accident report (1 RT 135) which Herns  
21 incorrectly assumed was inaccurate (2 RT 309.) Herns could not  
22 say if he told appellant that he needed to have insurance at the  
23 time of the accident in order to make the claim Herns forwarded  
24 to Morrison (2 RT 313-314.) Appellant did say at one point he did  
25 not know he was entitled to receive compensation for pain and  
26 suffering (2 RT 314,315.) From this evidence, and from Roberts's  
27 testimony, a reasonable jury could have concluded that appellant  
28 and Herns did not make any affirmative misrepresentation but that

1 Herns simply forwarded a claim as any civil attorney would and  
2 left it for the insurance company to prove whether appellant was  
3 entitled to the amount. Further, though appellant was not certain  
4 what he was entitled to receive under the law, he reasonably relied  
5 on the professional expertise of his attorney. Thus, Roberts's  
6 testimony would have supported the legal defense that neither Herns  
7 nor appellant had the intent to defraud; that is, neither intended  
8 to claim compensation for something he knew appellant was not  
9 entitled to receive . The Court of Appeals decision that the  
10 evidence of insurance industry practice was not relevant to the  
11 charges against petitioner is a objectively unreasonable application  
12 of clearly established United States Supreme Court precedent as  
13 applied in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) where  
14 the trial court exclusion of evidence relating to the defense  
15 theory had an "substantial and injurious effect or influence in  
16 determining the jury's verdict' or 'determining petitioner's guilt."

Claim two

THE TRIAL COURT FAILED IN ITS DUTY TO INSTRUCT ON  
MISTAKE NEGATING THE SPECIFIC INTENT TO COMMIT  
FRAUD.

20 Regarding claim two, the respondent argued that it is without  
21 merit. Reling on the Court of Appeals decision the respondent notes  
22 "The court of appeals found that there was no evidence that  
23 petitioner believed his conduct was lawful or that such a belief  
24 was held in good faith." Exh. F, 16. In the absence if any evidence  
25 to support giving the instruction, the court of appeals found that  
26 it was not error to fail to so instruct...The state court's deter-  
27 mination that there was insufficient evidence to warrant an instruc-  
28 tion is presumed correct under 28 U.S.C. 2254 (e)(1), and should

1 be the final word on the subject. Petitioner contends that the  
2 state court's decision that there was no evidence that petitioner  
3 believed his conduct was lawful or that such a belief was held in  
4 good faith or that in the absence of any evidence to support giving  
5 the instruction there was no error for failure to instruct. Here,  
6 the state appellate court's decision was based upon an unreasonable  
7 determination of the facts before the court. There is substantial  
8 evidence that petitioner believed his conduct was lawful or that  
9 such belief was held in good faith. There was evidence that  
10 petitioner would not know that he was not entitled to compensation  
11 for pain and suffering under Proposition 213. Herns testified that  
12 most people are unaware of the law or its details. (RT 283.) Herns  
13 also said that petitioner at one point stated he did not know that he  
14 was entitled to the pain and suffering that Herns was claiming (2 RT  
15 314-315). There was no evidence that Herns or anyone else explained  
16 to petitioner what he was legally entitled to receive if he were  
17 not insured (2 RT 313-314.) Petitioner would have reasonably relied  
18 on his civil attorney to properly investigate and make a claim.  
19 Since there was a significant amount of evidence to support peti-  
20 tion's defense that he did not know he was not entitled to the amount  
21 claimed, it was reasonably probable that a properly instructed jury  
22 would have found petitioner not guilty of counts two and three.  
23 The trial court's failure in its duty to instruct on mistake to  
24 negate the specific intent to commit fraud had a substantial in-  
25 fluence in determining petitioner's guilt under the Brecht standard,  
26 in that, one it removed the specific intent to defraud element from  
27 the juries determination an element the prosecutor was required to  
28 prove beyond a reasonable doubt; and two, it failed to instruct the

1 jury regarding petitioner's defense theory thus precluding the jury  
2 from considering the petitioner's defense to the charges against  
3 him.

4 **Claim three**

5 **TRIAL COUNSEL WAS INEFFECTIVE**

6 Concerning claim three, respondent relying on the state court  
7 of appeal's decision asserts that, "The state appellate court denied  
8 petitioner's claim of ineffective assistance of counsel after  
9 reasonably concluding that there was no error from the exclusion  
10 of the proffered expert witness testimony regarding insurance in-  
11 surance industry practices; and that there was no error  
12 in the jury instructions, see Exh. F, 16-17. Respondent further  
13 noted, "petitioner has failed to show that defense counsel's conduct  
14 was outside the range of acceptable representation." Petitioner  
15 contends that the state court of appeals denial of petition's  
16 Ineffective Assistance of Counsel claim was a clearly unreasonable  
17 application of clearly established U.S. Supreme Court precedent  
18 within Strickland v. Washington, 466 U.S. 668 (1984).

19 Here, defense counsel failed to argue that Roberts's test-  
20 imony was necessary for him to present a defense under the Federal  
21 Constitution. He failed to object to jury instructions on knowledge  
22 and the specific intent to defraud or to request an instruction  
23 stating that making a claim for compensation to which the petitioner  
24 did not know he was entitled was not illegal. Assuming the court  
25 lacked sufficient information to trigger its duty to act as required  
26 by law, then trial counsel rendered ineffective assistance of counsel.  
27 If trial counsel's motion and offer of proof were insufficient or  
28 inadequate to alert the court that Roberts's testimony was required

1 under the Fifth, Sixth, and Fourteenth Amendment then trial counsel  
2 was ineffective. Courts seldom fault counsel for failing to pose  
3 an objection or to call a witness. The court have recognized, however  
4 that counsel has a duty to provide the correct legal grounds in :  
5 arguing the admissibility of evidence and failure to do so is a  
6 basis for a finding of ineffective assistance of counsel, In re Jones  
7 (1996) 13 Cal. 4th. 552, 571-573. Here, counsel went through great  
8 lengths in arguing that the expert testimony of Roberts should be  
9 admitted. There can be no tactical reason for failing to state the  
10 correct legal grounds for its admission.

Further, trial counsel had a duty to request instruction which were vital to the defense, United States v. Spain, (9th. cir. 1996) 75 F. 3d. 1383, 1390. Here, trial counsel failed to ensure the jury was properly instructed on how a good faith mistake in law negates the specific intent to defraud.

Appellant must also prejudice; that is, there was a reasonable possibility that but for counsel's errors, the result of the case would have been different, (Strickland, *supra*, 466 U.S. at 687.) As explained above, the absence of Roberts's testimony and the absence of the instruction of good faith mistake to negate specific intent to defraud was prejudicial under any standard.

**Claim four**  
**CUMULATIVE PREJUDICE REQUIRES REVERSAL**

Finally, the respondent asserts that the cumulative error is without merit. In referencing the court of appeals decision that, "this claim of aggravated error is rejected because there were no errors and no showing that petitioner suffered prejudice." Exh. F, 17-18.) Petitioner contends that the state court of appeals decision

1 here, is based upon an unreasonable determination of the facts  
2 before the court. When some errors violate the federal constitution  
3 reversal is required if, with the cumulative effect of all errors,  
4 it cannot be shown beyond a reasonable doubt the error did **not**  
5 influence the outcome, see United States v. Rivera, (10th cir. 1990)  
6 900 F. 2d. 1462, 1470, fn. 6 (if any of the errors being aggregated  
7 are constitutional in nature,...Chapman should be used...");  
8 Phillips v. Woodford (9th. cir. 2001) 267 F. 3d. 966, 985-986.

9 Even if the court's exclusion of Roberts's testimony and the  
10 failure to properly instruct the jury, did not individually require  
11 reversal, their cumulative impact did. As explained above, both  
12 errors went to the heart of the defense. Without the expert test-  
13 imony and without the correct instructions, appellant was unable to  
14 present the defense that he did not knowingly make a claim for  
15 compensation to which he was not entitled.

16 CONCLUSION

17 Accordingly, for the reasons stated, petitioner respectfully request  
18 that the petition be granted.

20  
21 Dated:

VERIFICATION

I, Marcus James Hooks, state:

I am the petitioner in this action. I have read the foregoing Petition for Writ of Habeas Corpus and the facts stated therein are true of my own knowledge, except as to matters that are therein stated on my own information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 24, 2008, at Avenal State Prison, Avenal, California.

  
2-04-08  
MARCUS JAMES HOOKS  
PETITIONER

## PROOF OF SERVICE BY MAIL

I THE UNDERSIGNED, CERTIFY THAT I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE. THAT I CAUSED TO BE SERVED A COPY OF THE FOLLOWING DOCUMENT:

ENTITLED: DENIAL AND RESPONSE TO THE ANSWER TO THE ORDER TO SHOW CAUSE  
AND THE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
THEREOF.

**BY PLACING THE SAME IN AN ENVELOPE, SEALING IT BEFORE A CORRECTIONAL OFFICER,  
AND DEPOSITING IT IN THE [ UNITED STATES MAIL ] AT AVENAL STATE PRISON AND ADDRESSED IT  
TO THE FOLLOWING:**

OFFICE OF THE CLERK  
U.S. DISTRICT COURT I  
NORTHERN DISTRICT OF CALIFORNIA  
U.S. COURTHOUSE  
450 GOLDEN GATE AVENUE  
SAN FRANCISCO, CALIFORNIA, 94102-3483

EXECUTED ON 2, 14, 2008 AT AVENAL STATE PRISON, AVENAL CALIFORNIA

I, Marcus James Hooks DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAW  
OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

  
\_\_\_\_\_  
SIGNATURE OF DECLARANT

  
\_\_\_\_\_  
PRINT NAME OF DECLARANT

PRO PER.

## PROOF OF SERVICE BY MAIL

I THE UNDERSIGNED, CERTIFY THAT I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE. THAT I CAUSED TO BE SERVED A COPY OF THE FOLLOWING DOCUMENT:

ENTITLED: DENIAL AND RESPONSE TO THE ANSWER TO THE ORDER TO SHOW CAUSE  
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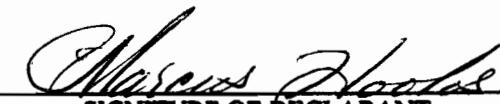
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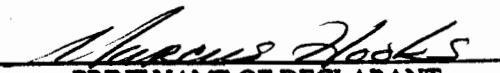
BY PLACING THE SAME IN AN ENVELOPE, SEALING IT BEFORE A CORRECTIONAL OFFICER,  
AND DEPOSITING IT IN THE [ UNITED STATES MAIL ] AT AVENAL STATE PRISON AND ADDRESSED IT  
TO THE FOLLOWING:

OFFICE OF THE ATTORNEY GENERAL  
455 GOLDEN STATE AVENUE, SUITE 11000  
SAN FRANCISCO, CALIFORNIA 94102-7004

EXECUTED ON 8, 4, 2008 AT AVENAL STATE PRISON, AVENAL CALIFORNIA

I, Marcus James Hooks DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAW  
OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

  
SIGNATURE OF DECLARANT

  
PRINT NAME OF DECLARANT

PRO PER.

Marcella Hooks  
T-89927 / 210-2-55 Low  
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MAIL  
FEB 25 2008  
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STATE PRISON



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